Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

KENNETH R. HILLIARD and
GREGORY D. STYLES, Trustees under
Trust Agreement dated May 5, 1979,
Petitioners,

v.

SHELL WESTERN E & P, INC.,
a Delaware corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN A. HILGER
Counsel of Record
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Attorneys for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

1. Whether the United States District Court and Court of Appeals' reversal of the District Court's Judgment in favor of over 800 class members on the basis of res judicata satisfies due process where the earlier action originally involved Defendant and 13 individual Plaintiffs and the parties to the earlier action expressly agreed to limit the claims to be litigated to one specific issue.

2. Did the United States Court of Appeals deny Petitioners due process by basing its decision on factual assumptions unsupported by the record in its de novo review of an order granting summary judgment, and by failing to remand the case to the District Court for consideration of Petitioners' federal and state constitutional claims?

PARTIES TO THE PROCEEDING

Petitioners

Kenneth R. Hilliard; Gregory D. Styles, Trustee under Trust Agreement dated May 5, 1997, as class representatives for: William H. Acker; Marilyn J. Acker; Advance Management, Inc.; Jack W. Alber; Margaret Alber; Union Pacific Oil and Gas Company; A.M. Fuels/Midland Management Royalty Fund 1983-1 Limited Partnership; A.M. Fuels/Midland Management Royalty Fund 1985-1 Limited Partnership; Amoco Production Company; Morgan W. Anderson and Elma K. Anderson, Co-Trustees of Anderson Trust W; Duane Anderson; First of America Bank Bay City TRE/UWO & Testament of Bessie S. Bradley Decd. FBO Janet Alexander Anderson; Zola L. Anderson; Apache Corporation; Dean A. Archer; John R. Archer; Phillip R. Archer; William T. Archer; Laurance H. Armour, Jr. d/b/a Lamar Properties Oil & Gas Exploration; Kenneth E. Arndt; Mary Jane Arndt; Bernard Asselin, Jr.; Gerald E. Avery; Henry W. Axford, Jr.; Beatrice Axford; Production Credit Association of Traverse City a/c of Henry W. Axford, Jr. and Beatrice Axford; Edward Ayres; James D. Baber; Ann L. Baber; Larry Badger; Cheryl Badger; Meldrum Baerwolf Trust and Dorothy Baerwolf Trust; Baerwolf/Anderson Special Acct.; Mary E. Bahr; Jay C. Thiebaut, Trustee of the Mary E. Bahr Trust; Jay C. Thiebaut, Trustee of Mary E. Bahr Grandchildren Tr.; Society Bank & Trust, Trustee Under D. Bailey, P.T. Bailey & R.H. Nies Title Holding Agreement; Justine W. Bailey; Lucille Ball; Empire National Bank of Traverse City, Successor Trustee of the Roy A. Bancroft Trust; Francis J. Bartosiewicz; Elizabeth L. Bartosiewicz; Richard Behrens; Peter J. Bender; Robert Benetti; Dallas Berryhill; Juanita Berryhill; Juanita M. Berryhill; Douglas E. Biesiada; Gayle M. Biesiada; Joseph P. Biermacher; Old Kent

Bank-Grand Traverse, Trustee of the Howard Z. Bisard Residuary Trust; Florence M. Block; Robert L. Bourne; Theresa L. Bowling Life Estate; Russell B. Bowling, Independent Personal Representative of the Estate of Steven Bowling; Floyd I. Bowling; Ophelia Bowling; Hugh D. Bowling; Hugh D. Bowling; Kathleen Bowling; Kathleen Bowling; Larry J. Bradford; Patricia Bradford; Bradford, Gordon 1986-3 Limited Partnership; William N. Bradley; Helen Bradley; Janet J. Brandt; National Bank of Detroit, Trustee of the Frederick Bradford REV/TR DTD 1/17/84; Harriett Bradford; Larry Bradford; National Bank of Detroit and Larry J. Bradford, Trustees of Bradford Minority Trust; Paul A. Bradford; Paul M. Bradley; Frederick A. Bradford; Carl E. Brandt; James W. Brannan; Hugo E. Braun, Jr.; NBD Bank, N.A. and Edward N. Bradford, Co-Trs. of the Edward N. Bradford Rev. Trust; Vicky L. Brehm; Helen E. Brehm; Vicky L. Brehm; Gordon L. Briley; Lawrence K. Brink; Cleo Brink; Bernard A. Briske; Alice J. Briske; Lawrence K. Brink; Bernard A. Briske; Elden & Elzina Briggs; Brockman Oil Company; Harry F. Brown; Ellen E. Brown; Ronald Brown; Audrey Brown; Charles Brown; H.N. Brumm; John P. Bull; Anthony F. Bunetta; Lorraine E. Bunetta; Michael J. Burskey; Jack G. Burson; Debra L. Burkart; Margaret J. Button; The Detroit Bank and Trust Company, Trustee of the Raymond Butka Trust Acct 33334; George Cailotto; Rex C. Campbell; Beatrice A. Campbell; The Russell J. Carlson Trust; Kenneth L. Carpenter; Lucille Carpenter; Cedar Lane Dairy Farms; Central Michigan Railway Company; Carolyn S. Charters; Barbara S. Cheresh; Joan Y. Weisman; I. Richard Savage; Barbara S. Cheresh; Chesapeake & Ohio Railway Co.; Winston S. Churchill; Mary C. Churchill; William Clare; Rosalie Clare; Gilbert R. Clark; Cora A. Clark; Ila Mae Clayton; Dorothy C. Clark; Keith F. Cline; Margaret Cline; Ralph Clous; Joan Clous; Daniel Clouse; Marie Kay Clouse; Charlotte Coe; Edwin D.

Coe; Nola J. Cole; Joseph Colliton; Jean Colliton; Gloria Schmidt Cone; Conoco, Inc. (Wachovia Bank & Trust Co.); Consumers Power Company; Byron J. Cook Trust; Dolores M. Cook Trust; Harriette C. Cook Trust; William F. Cook, Trustee of the William F. Cook Trust; Raymond Cooley; Carl E. Cooper; Betty A. Cooper; NBD Northwest Bank, NA A/C Countryside Products, Inc.; Ernest A. Coviak; Ilah J. Coviak; Ruth Crawford Trust, Second National Bank, Trustee; Claudie Belle Cronkhite, Suc. Trustee of the Samuel H. Cronkhite Family Trust; Lowell S. Cropp; Annie O. Cropp; David Crow; Doranda E. Crouch; Ruth Eloise Crouch; CSX Transportation, Inc.; Nicholas Cuca; Grace W. Curd; Craig H. Curtiss; Beverly Curtiss; Dorothy L. Czarnecki; Richard E. Dansby; Marion L. Dansby; Farmers Home Administration, A/C of Richard E. Dansby; Richard E. Dansby; Delores M. Darrow; Agnes M. Darbee; Howard Darbee; Glen S. Darrow; Donna Darrow; Antonine V. Dascanio; Sanford P. Dascanio; Ervin P. Davis; DBSV Investments, Inc., a Michigan corporation; Willa H. Decotes; Clyde R. Decker; Thelma J. Decker; Curtis L. Deel; Janet B. Deel; John J. DeLuca; Marlene J. DeLuca; Benjamin H. Dehart; Benjamin H. Dehart; Ruth DeKett; John DeKett; Detroit & Mackinac Railway Co.; Lamont Diefenbach; Norma Jean Diefenbach; Robert C. Dienes; Marie L. Dienes; Dilley, Dewey, Damon & Condon, P.C.; Second National Bank of Saginaw, Trustee for Susan M. Doerfner; Second National Bank of Saginaw, Trustee for William H. Doerfner; Ellsworth Domres; Hildegarde Domres; Richard T. Donahue; James E. Donovan; Holly L. Donovan; Helen Killius Downing; Clarence L. Dracka; Jean Dracka; James D. Dreyer; Randall Drzewiecki; Walter Drzewiecki, Sr.; Walter Drzewiecki, Jr.; Etta E. Duncan; Howard Edwards; Virginia Bishop, Personal Representative of the Estate of Howard Edwards, Deceased; E. Charles Eichenbaum; Old Kente Bank of Kalamazoo, Trustee of the El Mac Hills Resort, Inc. Trust;

Carol Ann Erickson; Harless W. Feagins; Robert A. Felcyn; M. Dale Fenstermacher; Eleanor I. Fenstermacher; Shirley Ferguson; David F. Fink; Old Kent Bank-Grand Traverse, Trustee U/W Dated 3/11/75 Fink Family Trust; First of America Bank-MID Michigan, Successor Trustee of Restated Revocable Trust Agreement dated 7/16/86; First Presbyterian Church of Maple Ridge; Louis F. Fischer; Amelia Fischer; Charles E. Fischer; Elaine J. Fischer; Production Credit Association of Bay City; Fisher Oil Company; Stanley M. Fisher; Douglas E. Foeller; Charlene Foeller; Charles K. Ford; Victor C. Fortino; Sara K. Fortino; Samuel Frankel; Bruce G. Freel; Ann Freel; Jay Bryan Freel; Irene Freel; Maurice A. Freel; Ethel Freel; Michael N. Freel; Susan G. Freel; Patrice Freel; Judy A. Freel; Virgil P. Freel; Harry R. Freyer; Fruit Haven Nursery, Inc.; Lois Fuerst; Corrinne M. Gamache; Marshall & Ilsley Trust Co., Trustee of Maxine R. Gantner Trust f/b/o Carole Priest; Ronald A. Gantner; Benjamin O. Garrett; Tessie Garrett; Felix Gauthier; Catherine Gauthier; Betty J. Gavette Living Trust; Vivian A. Gelo; General Energy Resources & Technology Corporation; Donald Girven, Independent Personal Representative of Walter Girven; Sidney W. Girven; Ruth Goede; Jose Gonzalez; George H. Gordon; Alan L. Gornick; Pauline M. Gornick; A.S. Gottloeb; Harold L. Grams; Janet S. Grams; George Gray; Doris E. Gray; Great Western Oil and Gas, Inc.; Great Lakes Land Company, a Michigan limited partnership; Irene M. Green; Roger Greve; Evelyn M. Greve; Cecil R. Gronlund; Leora Mae Gronlund; Arline Grotz; First of America Bank, Trustee of Gustafson Family Trust; Alma B. Gustafson; Vicki E. Waligorski; Doris Pike Guthrie Michigan Trust for A.K. Guthrie; Howard P. Guthrie; A.K. Guthrie and Guilford L. Jones, Trustees of A.K. Guthrie Michigan Trust for Mary Kate Guthrie; A.K. Guthrie and Guilford L. Jones, Trustees for A.K. Guthrie Michigan Trust for Will Wasson Guthrie; Marie D. Guyton; Stuart H. Haack;

Minnie F. Haack; Erma M. Hall; Vance Hall; Bernard L. Hamilton; Phyllis J. Hamilton; Armond Hansen, Trustee of the A. Hansen Trust; Doris Hansen; Salling Hanson, a limited partnership; John A. Harrigan; Elinor L. Harrigan; Clara Hartley; Thomas W. Hartley; Nancy L. Humphrey; Clarence W. Harju; Carol Harju; Lucille Harju; Leaun W. Harrelson; Louis E. Harrington; The Herbert L. Harrington Self-Trusteed Revocable Trust; Herbert L. Harrington; Dorothy R. Harrington; Frank D. Hart; Walter L. Harvey; Hasso Oil Company; Nannearle Sanders Hash; Carol D. Hawkins; Richard A. Hawkins; Theodore H. Hawkins; Floyd Hayes; Elizabeth Hayes; Gerald Hayes; Rose M. Hayes; Federal Deposit Insurance Corp., Southwest Service Center, a/c Estate of Walter J. Heath; Bernice M. Hegeman; Charles O. Hejl; Charlottte Hejl; George A. Helow; Connie Hency; Lee O. Henry; Eleanor O. Henry; Raymond C. Hensley; Ferva C. Hensley; Donald D. Herman; Rita A. Herman; Dale S. Hess; Ruth L. Hess; Jack D. Highfield; Marjorie Highfield; Russell E. Hilden; Susan K. Hilden; Jean M. Hilliard; Old Kent Bank of Kalamazoo, Personal Representative of the Estate of Earl E. Hilliard; Ernest C. Hilliard; Betty Hilliard; Kenneth R. Hilliard; Jo Hannah Hillard; Kevin A. Hillard; Margaret L. Hilliard; Robert Hilliard; George Hillyer; Margaret Hillyer; Roger Hill; Delmon Hodges; Kenneth R. Hoekwater, Trustee of the Kenneth R. Hoekwater Trust dated 9/27/84; Michael W. Hoey; Linda W. Hoey; Dorothea Hoffman; Elwon Lee Hoffman; Security National Bank a/c Marshall Hoffman, et al.; Old Kent Bank-Grand Traverse, Trustee of the Marshall L. Hoffman Trust; Marilyn W. Holleran; Evert J. Hopwood; Edward W. Horvat, and Joyce N. Horvat, Trustees of the Edward W. Horvat Revocable Living Trust; K.L. Hostutler Trust f/b/o L.A. Hostutler, A.M. Sexton, K.M. Hostutler, L.L. Young and P.S. Honeysett; Howard Land & Minerals, Inc.; Howard Energy Co., Inc.; Albert C. Howard; William P. Huntey; Linda Huntey; Hydrocarbons Investments;

Mercantile Trust & Savings Bank a/c Steven D. Irwin and Ann S. Irwin; Suzanne Irwin; Issof Associates; Jabe Limited, a corporation; M. Loretta Jach; Rick J. Jach; Thomas L. Jakee; June K. Jakee; Richard E. Jakee; Bonny J. Jakee; Mark C. Jansma; Theresa Jaruzel; Anna Jaruzel; Benjamin W. Jayne; Shirley Jayne; Vernon L. Jewell; Vada Jewell; FMB-Security National Bank a/c Althea Johnson & Shirley Mlejnek JT/WRS; Dan L. Johnson; Sally Johnson; Joanne M. Johnson; West Michigan Nat'l Bank, Trs. Mabel L. Johnson Trs 4/22/76, Trs. of Mabel S. Johnson and Victor J. Johnson Trs. 5/12/80; Paul T. Johnson; Frances B. Johnson; Hackley Bank & Trust, NA and Trust Co. as Trustee for Toivo H. Johnson; West Michigan Nat'l Bank, Trs. Victor J. Johnson Trs. 4/22/76, Trs. of Mabel S. Johnson and Victor J. Johnson Trs. 5/12/80; Raymond M. Jones; June Rose Jones; Richard M. Judd; Betty Judd; Harold A. Kapp; Ethel Mae Kapp; Manistee Bank and Trust Co., Trustee of Ronald E. Kamaloski and Betty Jean Kamaloski Trust; Ronald E. Kamaloski; Betty Jean Kamaloski; Aloysius Kanka; Eleonore Kanka; Maurice C. Kaplan; Billie Marthelle Karcher; J. Paul Karcher; Norman Kaskinen; Martha Agnes Kaskinen; Arthur M. Keillor; Leona V. Kelley; Virginia Kelley; Daniel B. Kempa; Judith Kempa; Beverly Anne Kenney; William R. Kerr; Helen Margareet Killius; Anton Kilian; Elizabeth Kilian; John Kilian; Dorothy Smith Kinney; James H. Kirk; Mary Kirk; Gaylord A. Knapp; Shirley E. Knapp; Eileen Kochevar; Eileen M. Kochevan Vickers, Trustee of the Irene M. Kochevar Trust; Anton Raymond Kochevar; George Kohlohf; William F. Komerska, Trustee under Declaration of Trust dated 8/15/77; Anna J. Komrska, Trustee of the Anna J. Komrska Trust; Donald E. Komrska; Mildred Ann Komrska; Comerica Bank, Trustee of the Joseph E. Komrska Trust; Roger R. Komrska; Theresa C. Komrska; Virginia M. Koskela; Virginia M. Koskela; Clifford Koskela; Carol Ann Curry; Carl Kreiser; Margaret Kreiser; Ralph E. Kreiser,

Trustee of the Ralph E. Kreiser Revocable Trust dated 8/21/84; Rose Kress; Gordon G. Kruse; Floyd J. Kubacki; Irene T. Kubacki, Trustee of the Trust Agreement of Irene T. Kubacki; Chester F. Kudla; Lillian T. Kudla; James L. Kyselka; Ellen Frances Kyselka; LNS Company, a partnership; Ladd Petroleum Corporation; Thelma E. Lahr & 2nd Natl Bank of Saginaw, Co-Trustees of the Bernard E. Lahar Restated Trust Agreement dated 2/16/89; Thelma E. Lahar, Trustee of the Thelma E. Lahar Loving Trust u/a/d 2/19/90; Lake Horicon Corporation; Edward Lambert; Eva Lambert; Floyd A. Lambert; Betty L. Lambert; Mervil K. Lambert; Thomas L. Lang; Jerry Arthur Lane; Christine Kay Lane; Delbert Laponsey; Donna Laponsey; Francis Latuszek; Mary J. Latuszek; James F. Lawnichak; Robert G. Lawnichak; John W. Ledford; Barbara L. Ledford; Raymond E. LeDuc; Shirley A. LeDuc; Ilene M. Leighton; Earl F. LeSarge; Beverly R. LeSarge; Evangelene LeSarge; Robert D.W. Landon II, Tr. for Cole P. Lewis U/Instr 10/23/77; Robert D.W. Landon II, Tr. for Gail W. Lewis U/Inst 10/13/77; Ferd W. Limberg; Elizabeth Limberg; Elma Hertle, Successor Trustee of the Otto Lindros Trust; Frank J. Lipinski; Carol J. Lipinski; John D. Lippert; Nancy Wood Loening; Geraldine Longwood; Kenneth A. Lucas; Monti L. Lucas; Gerald Lutz; The Lutheran Home and Service for the Aged, an Illinois corporation; Bernard Lewis Lutz; Calvin C. Lutz, Trustee of the Calvin C. Lutz Trust Agreement dated 7/15/66 as amended 9/6/86; Lorraine A. Lutz, Trustee of the Lorraine A. Lutz Trust Agreement dated 9/6/86; Bernard L. Lutz, as Trustee of the Bernard L. Lutz Trust Agreement of 9/21/91; Robert D. Lyman; Judith D. Lyman; Alphon G. Lyman; Irene M. Lyman; Denise Mack; Janet Madaffer; Olive E. Maghielse; Nancy Mahoney; Rebecca J. Majeske; Mildred Malik; Ronnie D. Mallison; Ruth M. Mallison; James F. Maniccia, Sr. Trust dated 4/18/87, Ronald D. Maniccia and William F. Rolinski as Co-Successor Trustees;

Robert J. Mannes; Rose Mannes; Josephine C. Mannila; Robert H. Manthey; Gordon Manthey; Old Kent Bank & Trust Co., Trustee of the Irene Marcenkowski Trust; Empire National Bank, Trustee for the Donald Marshall Trust; Marshall Enterprises, a co-partnership; Edward Martella; Leona E. Martella; Lockheed-Martin Corp.; Maryanne Lavan; Old Kent Bank and Trust Co., Trustee of the Jerome Marcenkowski Trust; Old Kent Bank and Trust Co., Trustee of the Irene Marcenkowski Trust; Edward Martella, Jr.; Leona Martella; Edward D. Maskeny, Trustee of the Edward D. Maskeny Trust; Edward Maskeny; Security Nat'l Bank a/c Charles E. Mattison and Josephine Mattison; Security National Bank a/c Josephine Mattison; Charles E. Mattison; James H. Maue; Effa L. Maue; Internal Revenue Service a/c Richard Mazur, Levy Proceeds; Richard Mazur; Frank D. McAllister, Jr.; Esther H. McCreery; Betty E. Thomas; West Michigan National Bank, Trustee of the Esther M. McCague Trust; West Michigan National Bank, Successor Trustee of the James M. McCague Trust; John H. McCarthy; Michael B. McClintic; George F. McCreery; Ester McCreery; Mildred McDaniel; Harold A. McLaughlin; Dorothy L. McLaughlin; Finley B. McNeil; Lucille McNeil; Norma Jean Meacham; William C. Medford; Sharon Ann Medford; Gerald E. Meister; Lila A. Meister; Donald W. Meister; Kay D. Meister; Darwin O. Meister; Delbert G. Meister; Donald W. Meister; Old Kent Bank & Trust Company a/c Ellis E. Meister; Gerald E. Meister; Joel D. Meister; Rita E. Merkey; Henry Merkel; Mary B. Merkel; Martin Merkel; Ann M. Merkel; Joseph E. Merkel; Charles W. Merriam III; Carolyn Merriam; Herbert T. Merrill; Wilma Merrill; Edna Meyer; Chemical Bank & Trust Company, Successor Trustee of the Lewis Lantz Michelson, Sr. Trust; Chemical Bank & Trust Company as Successor Trustee of the Lewis Lantz Michelson, Jr. Trust; Mich-Tex Royalty Company; Mid Mich Minerals Limited Partnership; Mid-West Royalties; Gregory P.

Migliore; Rose Marie Migliore; Leon S. Millard; Elaine M. Millard; Henry A. Miller; Shirley G. Miller; Leon S. Millard; Ronald A. Miller; Carol S. Miller; Rose A. Miller; Carl F. Mills; Joyce A. Mills; Roxane Anderson Miner; Kathryn M. Mlcek; George A. Moberly; Standard Federal Bank for the Account of John T. Monarch; Monitor Sugar Company; Terrance E. Morley; Cheryl S. Morley; Robert Mosbacher; Charles J. Moskowitz; Ruth Moyer; Theresa E. Moy; William Moy; Lorin C. Moyer; Ruth Moyer; Internal Revenue Service-Levy Proceeds for the Account of Roger Muldavin and Jean Ann Muldavin; Roger Muldavin; Jean Ann Bowling Muldavin; Robert L. Mund; Robert L. Mund; Lillian H. Mund; Wanda Muse; Natalie Hunt; James Muslow; A. Claire Mutch and Harry L. Mutch, Co-Personal Reps. of the Estate of Mary W. Mutch, Deceased; First National Bank of Gaylord for the Credit of Bruno C. Muzyl and Jane R. Muzyl; Bruno C. Muzyl; William C. Myers; Anthony V. Myszkier; Johanna Myszkier; Harry C. Nelson, Trustee of the Harry C. Nelson Trust; Patricia Nelson, Trustee of the Patricia Nelson Trust; J.C. Newman; Anna E. Newman; John C. Neyer; Kenneth D. Neyer; Diane Y. Neyer; Old Kent Bank-Grand Traverse, a/c Kenneth D. Neyer and Diane Y. Neyer; Robert J. Neyer; Isabella Bank & Trust for the Commercial Loan Account of Robert J. Neyer; Traverse City State Bank a/c Robert J. Neyer; Bobby Nichols; Clyde Neisen; Grace J. Neisen; Harold O. Nobbs; Henry F. Nobbs; Old Kent Bank-Grand Traverse, Trustee of the Jane E. Norton Revocable Intervivos Trust #1; Charlotte Nugent; Evelyn J. Nugent; Robert W. Nugent; Neil W. Nystrom; Dorothy Nystrom; Old Kent Bank-Grand Traverse, Trustee of the Ralph J. Ockert Trust; Allen O'Dell; Jean O'Dell; Felix Olszewski; First of America Bank, Grace J. Niesen, Trustees of Olsen Trust dated 11/25/75; First of America Bank & Grace J. Niesen, Trustees of Jennie L. Olsen Trust; First of America Bank, Trustee of Albert T. Olson; Jean Kerr

Olson; Felix Olszewski; Genevera F. Olszewski; Central State Bank a/c Frank J. Orsini; Michael C. Osband; Nellie Osband; Edward D. Ososki; Stanley S. Styles and Gregory D. Styles, Trustees of the Dyann M. Otero Trust Agreement dated 9/24/75; Nedra J. Otis; Thomas A. Otten; Sandra Otten; Vera G. Oviatt; Packaging Corp. of America; Tenneco Oil Company a/c of Packaging Corporation of America; E.J. Packwood; Arthur J. Pahl and Donald R. Pahl, Co-Trustees of the Arthur J. Pahl Revocable Trust; Clarence Pahl; Rudolph Palombit; Bernadette Palombit; Nan Patton, Personal Representative of the Estate of Richard Earl Patton; Donald M. Patten; Joseph F. Paulus; Kathryn Stanley Paulus; Lenard W. Pearson; George A. Percha; A.K. Guthrie & Guilford L. Jones, Trustees for Mary Lynne Perry Michigan Trust for Brian Howard Perry; A.K. Guthrie & Guilford L. Jones, Trustees for Doris P. Guthrie Michigan Trust for Mary Lynne Guthrie Perry; Doris Pike Guthrie Michigan Trust for Mary Lynne Guthrie Perry; Mary Lynne Guthrie Perry Michigan Trust for Brian Howard Perry; John Pewinski, Trustee of the John Pewinski Living Trust; Old Kent Bank & Trust Company, Trustee of the Pewinski Family Trust; Robert F. Philp, Trustee under the Pour-Over Trust of Robert F. Phlip Dated 2/15/90; T.T. Phillips, Jr.; Robert Philp; Phoenix Petroleum Co.; Virginia L. Pieper; Richard J. Pieper; Donald G. Pike; Delores M. Pike; Viola Pirvu, Personal Representative of the Estate of John Pirvu, Jr.; John Pirvu, Jr.; Viola Pirvu; Paul Plagany; Marion M. Plagany; Paul J. Plagany; Cletus S. Plamondon; Eva E. Plamondon; August J. Pomaville; Lottie Pomarzynski; Mary Pontisso Trust, Mary Pontisso & Joseph Cusin, Trustees; William A. Porter; Kathleen Porter; Stuart W. Porter; Myrna Porter; William A. Porter; Kathleen G. Porter; Preston Oil Company; David R. Prior; Doreen P. Prior; William L. Prior; Bernice Prior; Arnold R. Prosch; Frances Wadsworth Pross; Elaine Pross; Anna Ingeborg Hanson Raae & Old Kent Bank & Trust Co.,

Trustees for Anna Ingeborg Hanson Raae u/t/a dated 2/5/85; Kenneth A. Schwark, Successor Trustee of the Helen Rachow Trust dated 12/22/82; Helen Rachow; Alfred Radtke; Ramoco, Inc.; Kenneth M. Ramsay; Mona Ramsay; Morris D. Ramsay; Wilma J. Ramsay; Elaine Rapanos; William E. Rasmussen; Norma Rasmussen; William T. Rasmussen; Christine M. Rasmussen; Old Kent Bank-Grand Traverse, Trustee of the Frank I. Rawlings Family Trust; Jerome A. Ray; Karen M. Ray; Charles J. Reamer; Vernon A. Reckow, Trustee of the Vernon A. Reckow Revocable Trust dated 11/12/82; Marjorie L. Reckow, Trustee of the Marjorie L. Reckow Revocable Trust dated 11/12/82; First of America Bank, Trustee of Majorie L. Reckow Trust; First of America Bank, Trustee of the Vernon A. Reckow Trust; The Cadillac State Bank a/c Robert C. Redman; Reef Energy Corporation; June C. Rengo; Raymond A. Rengo; Robert E. Rengo; Estella Rhoads; Harley B. Rice; Willis James Roberts; Helena Roberts; Nelson A. Miles, Conservator/Guardian of the Estate of Helen B. Roblin & Ralph H. Routier; Nancy M. Rogers; Lisa Rossi, Personal Rep. of the Estate of Albert J. Rossi, Deceased; Albert J. Rossi; Eleanor M. Rossi; Judith C. Rouse; Ralph H. Routier; Patricia G. Rovsek; Sandra J. Rovsek, Trustee of Sandra J. Rovsek Trust dated 8/15/74; Rose P. Rudy; James E. Rudy, Sr.; Frederick Ruegsegger; Mary Josephine McKnight Runge; Comerica Bank, Trustee of the Thomas E. Rush, M.D. Trust; Alice Patricia Ryckman; SHR Limited Partnership; SHR Limited Partnership; Joyce Boucher Sabel; Linda Saddler Martin; Marian Saddler; Arthur M. Salo; Paul E. Salo; Elna A. Salo; Norman A. Samkowiak; Shirley A. Samkowiak; Merrill Lynch a/c Sand Bay Company; Prudential-Bache Securities a/c Sand Bay Co.; Julian A. Sanak; Esther J. Sanak; I. Richard Savage; Joseph W. Schuman; Judith A. Schuman; Harvey Schimke; Helmi Schimke; Theodore E. Schimke; Walter Schuimke and Audrey Schimke, Joint Tenants With Right of Survivorship;

Ruby Schwartz; John F. Schmuckal, Jr.; Josephine M. Schmuckal; Elmer Schmuckal; Rose Schmuckal; Empire National Bank, Trustee of the Elmer A. Schmuckal Irrevocable Inter Vivos Trust; Howard R. Schoenberger; Dorothy L. Schoenberger; Kenneth E. Schreur, as Trustee u/t/a of 8/24/78; Gary R. Schwaiger, Pamela S. Hudson and West Michigan Nat'l Bank, Co-Trustees of the Natholee C. Schwaiger Trust; Gordon P. Schroeder, Jr.; Richard L. Schroeder; Sylvia M. Schroeder; Arthur J. Schwaiger; Natholee C. Schwaiger; Esther C. Schuman Life Estate; Richard Schuster; Dorothy Schuster; John D. Sedelmaier; Hazel M. Sedelmaier; Old Kent Bank-Grand Traverse, Trustee of Ann E. Sedlar Revocable Trust of 8/12/81; Old Kent Bank-Grand Traverse, Trustee of Peter C. Sedlar Trust; Wilbur H. Seitters; Hazel M. Seitters; Donadl H. Sellke; Deanna S. Sellke; Elroy P. Sellke; Donna Sellke; Louis E. Shaffer; Mary A. Sheehan; George C. Short, Jr.; Mary K. Short; Glynn J. Silverthorn; Anne M. Silverthorn; Lila H. Simcox, James H. Simcox and Marilyn E. Chapman, Trustees of the Howard G. Simcox Family Trust; George J. Simon; Magdalene Simon; Lawrence Simon; Emma B. Simpson, Trustee of Emma B. Simpson Trust; William Simpson; Gladys L. Sinn; Sioux Corporation, Inc.; Stanley Siuda; Rita Siuda; Kelly Six; Emaline T. Six; Virgil J. Skiera, Jr.; Sharon A. Skiera; Jerome R. Skocelas; Catherine R. Skocelas; Glenn E. Slucter; Agnes K. Slucter; Northwestern Savings Bank and Trust of Traverse City, Successor Trustee of the Smith Family Trust; James E. Smith; Olive C. Smith; Louis A. Smith; Richard Sands Smith; South Coast Terminals, Inc. Profit Sharing Plan & Trust; John Spedoski; Marianne I. Spedoski; Leona F. Spedoski; William T. Spencer; J.J. Spielberg; Michigan Natl Bank a/c William L. Staley; Stangor Land Co. Sandra J. Steele; Juanita M. Steinebach; Doris A. Steketee; Old Kent Bank Grand Traverse, Trustee of the Pierce Stocking Marital and Family Trusts; Aileen P.

Stocking, Trustee of the Aileen P. Stocking Self-Trusted Trust dated 11/9/79; Frederick F. Strale; Mary Ellen Strale; William J. Strickler; The Champaign National Bank, Trustee for Shirley Kreason Strout Revocable Living Trust; Peter W. Strumbos; Nicholas P. Strumbos; George T. Strumbos; Champaign National Bank, Trustee Under Declaration of Trust of Ross P. Strout; Emily M. Stump, Trustee of the Emily M. Stump Revocable Trust dated 3/18/92; Stanley S. Styles and Gregory D. Styles, Trustees of the Douglas Styles Trust Agreement dated 9/22/75; Gregory D. Styles, Trustee Under Agreement dated 5/11/79; First of America Bank, Trustee of Fred W. Sundbeck and Myra Sundbeck; Old Kent Bank-Grand Traverse, Trustee under Svec Family Trust dated 10/25/74; Gerald J. Talbot; Peoples National Bank & Trust Co., Trustee u/w/o Minnie L. Talbot; Estate of Clarice Tapson, Deceased; First of America Bank Bay City, TRE/UWO Harold F. Bradley, Deceased; First of America Bank Bay City TRE/UWO Bessie S. Bradley, Deceased; John Thaut; Robert W. Thieman; Jane A. Thieman; Freida Thomas; Rollin D. Thomas; Mary J. Thomas; Thomas W. Thomas; Carol Gould Thompson; John G. Thompson; Kenneth E. Thompson, Trustee of the Kenneth E. Thompson Trust Account; T.T. Thompson; First of America Bank Bay City TRE/UWO Bessie S. Bradley, Deceased; Fred C. Tinsey, Jr.; Barbara Ann Tinsey; Paul W. Tinsey; Frederick C. Tinsey, Jr.; E. Diane Tope Living Trust u/a dated 5/16/91; H.E. Tope, Inc.; Irwin J. Traines; Lois E. Traines; Tres Ritos Oil Co.; Robert E. Tucker, Jr.; First of America Bank, Trustee of Alex Tuisku Trust; USX Corporation; H.L. Brown, Jr.; Upper Mulvaney Resources Group; Arlene B. Vacek; Zoltan J. Vagi; George Valek; Gloria Isabella Valliere; Virgil VanTol; Eileen VanTol; Dorothy VanDorsten; Charles VanDorsten; Old Kent Bank and Trust Co., Trustee of the Veraghen Family Trust; Old Kent Bank & Trust Company, Trustee of the Martin G. Veraghen Residual

Trust; Old Kent Bank & Trust Company, Trustee of the Vera V. Veraghen Trust; George R. Verscheure; Janet J. Verscheure; Alice Vier; Viking Recreational Club; Virgil D. Vinecki, Trustee of the Revocable Living Trust of Virgil D. Vinecki u/a/d/ 9/20/82; Virgil D. Vinecki; Theresa L. Vinecki; West Michigan National Bank, Successor Trustee of Edward J. Viol and Marie G. Viol Trust; Clifford Voigt; Donna Voight; Samuel Voight; Gertrude Voigts; Thelma L. Walker; Lyle F. Wallace; Jean B. Wallace; Beatrice Walraven, Beverly J. Covieo, Arthur W. Walraven, Jr. and Frederick A. Walraven as Trustee JT/WRS; Edwin P. Walter; Eleanor C. Walter; Gerald L. Walter; Harriet Walter Life Estate; Harriet J. Walter; Marvin J. Walter; Ruth J. Walter; Arthur Walton; Edwardine A. Walton; Wanda Walter; L. Brent Walton; Norma E. Walton; Irene Ware; Old Kent Bank-Grand Traverse, Trustee under Waslawski Family Trust Agreement dated 5/22/75; Elizabeth Ann Waterhouse, Trustee; Elizabeth Ann Waterhouse; Marguerite E. Weaver; Melvena L. Weber; Jenette M. Weber; Robert J. Webber; Joseph L. Weber; Jenette M. Weber; Mose D. Weber; Melvena L. M. Weber; Empire National Bank, Trustee of the Norine E. Weber Trust; Edward Wedholm; Doris Wedholm; Joan Y. Weisman; Donald P. Weiss; Gayleen B. Weller as Trustee of the Gayleen B. Weller Living Trust dated 2/16/88; Henry L. Weller; Hilda E. Weller; Gayleen B. Weller and Richard L. Weller, Succ. Co-Trustees of the Richard A. Weller Living Trust; Gullan M. Wellman and Alan F. Stone, Personal Reps. of the Estate of Arthur O. Wellman; Marlene R. Weller; Howard G. Wendland; First of America Bank-Mid Michigan NA and Charles K. Ford, Co-Trustees of the Howard G. Wendland Trust; First of Ameirca Bank-Mid Michigan NA and Charles K. Ford, Co-Trustees of the Robert Wendland, Jr. Trust; Adeline K. Werp; Victor Werp; Francis J. Wery; Western Royalty Co.; Kenneth R. Widgren; Howard R. Wieland; Jacques L. Wiener, Jr.; William B. Wiener, Jr.;

Michael Johnston, Trustee of the Louise Willick Revocable Trust; Barnett Banks Trust Company and Everett Redmond, Trustees of E.M. Wild Trust; Ione I. Wiles; Russell F. Files; Marvin L. Wilkie; Marjorie E. Wilkie; Geraldine M. Willey; Athel E. Williams; Helen C. Williams; Michael Johnston, Trustee of the Louise Willick Revocable Trust; Harry C. Williams, Trustee Under the Harry C. Williams Agreement of Trust dated 10/15/81; Wilton Limited Partnership No. 1; Wilton Oil Co.; John E. Winkler; Ruth L. Winkler; Sadie Wirbel; Old Kent Bank-Grand Traverse, Trustee of Delia C. Wise Revocable Trust; Donald N. Wise; Elizabeth Wise; Mary Dee Wise; Robert L. Wise; Northwestern Savings Bank & Trust, Successor Trustee of the Robert M. Wise Trust Agreement; Wistrand Statewide Realty of Traverse City, Inc.; Cleo C. Wolf; Margaret M. Wolf; Wolverine G and 0-2142604; John W. Wood; Eileen L. Wood; Norwest Bank Excelsior; Menold Crawford Hippler & Co.; C/O Barnett Bank of Lee County a/c Warren W. Wood; Martin R. Woodhams; Linda Woodhams; Donald A. Wright; Barbara M. Wright; Old Kent Bank-Grand Traverse, Trustee of the Alois J. Wurm and Rose T. Wurm Trust; Marguerite F. Yahr; Joseph Yakubowski; Donald E. Yohe; Robert Zaschak; Sandra A. Zaschak; Donovan Ziehm; Joyce Ziehm; Joanne Zimmerman; Grace E. Zimmerman; Jack W. Zimmerman; Joanne Zimmerman, Personal Representative of the Estate of Jack W. Zimmerman, Deceased; Jo Anne Zimmerman; Richard W. Zimmerman; Joseph F. Zupin; Marcella A. Zupin; Martha M. Zurbrigg; David Ricky Edge; Larry Horton; Morton D. Aulls; Ronald J. Brewer, PC; James R. Temple; Charles W. Borgsdorf; Roger Wood; Tom Lewis; Freidolph K. Olson; Frances E. Kerr.

— **Respondent**

Shell Western E & P, Inc.

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OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit issued its unpublished opinion on May 22, 1998. A copy of the opinion is included in the appendix at page 22a. (App. C; pp. 22a-34a)[1] The United States District Court for the Western District of Michigan, Southern Division, ordered entry of the final judgment on March 20, 1996. A copy of the order and the final judgment is printed in the appendix at page 23a. (App. F; pp. 42a-51a)

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on May 22, 1998. On June 3, 1998, Petitioners filed a Petition for Rehearing and for Rehearing En Banc (App. B), which the United States Court of Appeals denied on July 6, 1998. (App. A) This Petition for Writ of Certiorari is being filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV § 1

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

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[1] Citations to "App." are to the appendix filed with this petition for writ of certiorari pursuant to Supreme Court Rule 14(i).

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Const. 1963, art. IV § 24

No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

Mich. Const. 1963, art. IV § 32

Every law which imposes, continues or revives a tax shall distinctly state the tax.

MICHIGAN SUPERVISOR OF WELLS ACT

Mich. Comp. Laws Ann. §§ 319.1 - 319.27 (West 1984). (App. M)

MICHIGAN OIL AND GAS SEVERANCE TAX ACT

Mich. Comp. Laws Ann. §§ 205.301 - 205.317 (West 1986). (App. N)

STATEMENT OF THE CASE

This case is factually uncomplicated. Petitioners are owners of royalty interests as lessors of mineral rights in oil and gas produced from wells owned and operated by Shell Western E & P, Incorporated ("Shell"). A previous lawsuit raised challenges to Shell's practice of deducting from their royalty payments a tax levied as Michigan's Oil and Gas Severance Tax, Act 48 of the Michigan Public Acts of 1929, as amended, Mich. Comp. Laws Ann. § 205.301 et seq. ("Act 48"). Although the leases contained no specific authority for the severance tax deduction, the Michigan Court of Appeals upheld Shell's practice. *Brown v. Shell Oil Co.*, 128 Mich. App. 867 (1983), *reh'g denied, appeal denied*, 424 Mich. 867 (1986) *cert. denied*, 479 U.S. 824 (1986). Following the Court of Appeals' decision on the Act 48 claim, *Brown v. Shell* was settled as a class action addressing limited issues and specifically excluding Act 48 issues. (App. L)

Six years after the *Brown* settlement, Petitioners discovered that Shell made a practice of deducting from the royalty checks due Petitioners a privilege fee assessed against Shell pursuant to the Michigan Supervisor of Wells Act, Act 61 of the Michigan Public Acts of 1939, as amended, Mich. Comp. Laws Ann. § 319.1 et seq. ("Act 61"). (App. M) Shell disguised its deduction of Act 61 privilege fees by including it in the "taxes" description of deductions on the royalty check stubs. After discovering Shell was wrongfully deducting the Act 61 fee, Petitioners filed this class action in the Circuit Court for Grand Traverse County, Michigan, alleging breach of contract, fraud, and violation of RICO (18 U.S.C. § 1341), and challenging the constitutionality of Act 61 if interpreted to impose liability on royalty owners. (App. K) Shell removed the case to the United States District Court for the Western District of Michigan, invoking that court's federal question

jurisdiction.

Petitioners contended that, because Act 61's definition of "producer" excluded royalty owners, they could not be held responsible for payment of the privilege fee absent a contractual obligation to do so. The District Court agreed, rejecting Shell's position that the Act 48 definition of "producer," which includes royalty owners, should be read into Act 61. Because the undisputed language of the leases nowhere contained a provision allowing Shell to deduct the Act 61 privilege fee from royalty payments, on November 2, 1993, the District Court granted Petitioners' Motion for Partial Summary Judgment, finding that Shell's deduction of the Act 61 fee constituted a breach of contract. Because the District Court found that the language of Act 61 did not impose the privilege fee on royalty owners, the District Court granted summary judgment for Petitioners on their breach of contract claim and dismissed Petitioners' constitutional claims as moot. (App. J)

Shell claimed that the earlier case, *Brown v. Shell*, *supra*, precluded Petitioners from bringing this action. The District Court disagreed and denied Shell's motion for summary judgment on the issue of res judicata, indicating that the record did not demonstrate whether Petitioners were aware or could have become aware of the Act 61 deductions at the time of the *Brown v. Shell* action, or whether Petitioners had the opportunity to raise those claims in the *Brown v. Shell* action. (App J) Shell raised the res judicata issue in two subsequent motions, both of which the District Court denied. (App G & H & I)

In May, 1995, Petitioners' RICO claims were dismissed voluntarily, leaving only the pendant state claim for breach of contract. The District Court denied Shell's request to remand the action to state court, and on March 20, 1996, the District Court entered a final order awarding Petitioners damages for

breach of contract to be measured by the Act 61 deductions taken from royalty payments. (App. F)

Shell appealed the final judgment to the United States Court of Appeals for the Sixth Circuit. Following oral argument, the Court of Appeals issued an order certifying questions to the Supreme Court of Michigan. Being of the opinion that "resolution of the issues raised in this case may well have a significant impact on Michigan jurisprudence and upon the public fisc," the Court of Appeals certified the following questions to the Supreme Court of Michigan:

> (1) Whether, under the doctrine of res judicata, a group of property owner lessors, who previously challenged their lessee oil and gas driller's practice of deducting a pro rata share of Act No. 48 taxes from land owners' royalties, and who knew or should have known that the tenant lessee driller was at the same time deducting a share of the Act No. 61 fee, is precluded from now litigating the Act No. 61 deduction; and
>
> (2) Whether the correct interpretation of § 22 of Act No. 61, which imposes a fee on "oil and gas produced," and which incorporates Act No. 48's provision for collecting taxes from "producers" of gas and oil, also requires incorporating Act No. 48's definition of "producer" or whether Act No. 61's definition of "producer" should be inserted into Act No. 48's collection scheme, despite the fact that the term "producers" is not used in § 22 of Act No. 61.

(App. E)

On February 24, 1998, the Supreme Court of Michigan entered an order declining the request to answer the certified questions. (App. D) On May 22, 1998, the United States Court of Appeals issued its opinion which begins with the following explanation:

> RYAN, Circuit Judge. A word of explanation is in order concerning the delay in rendering our opinion in this case.
>
> Because the issues brought to us on appeal are exclusively questions of state law, we certified these issues to the Michigan Supreme Court on October 22, 1997, asking it to decide the questions. On February 26, 1998, we received a one sentence order from the Michigan Court declining 5-2 our request to answer the questions certified. No reason for the declination was given. We proceed therefore to resolve these questions of Michigan law in this unpublished opinion since what we say is not precedential.

(App. C; p. 22a-23a)

The Court of Appeals reversed the District Court's judgment and remanded for entry of judgment for Shell, concluding that res judicata barred Petitioners' claim. The court further concluded that the District Court had misinterpreted Michigan law. According to the Court of Appeals, even though royalty owners are not "producers" as that term is defined in Act 61, they are nonetheless responsible for the privilege fee imposed on producers by that act by virtue of the definition of "producer" in Act 48 -- a definition that includes royalty owners. (App. C) On June 23, 1998, Petitioners moved for rehearing and for rehearing en banc, asserting not only that the Court of Appeals had based its

decision on erroneous assumptions and factual determinations unsupported by the record, (App. B; pp.4a-8a) but also that it had ignored Michigan legislative history (App. B; pp. 12a-13a), rules of statutory construction. (App. B; pp. 13a-16a), as well as Michigan case law, including *Mobil Oil Corp. v. Dep't of Treasury*, 422 Mich. 473; 373 N.W.2d 730 (1985), which ruled that a royalty owner is not involved in production. (App B; pp. 16a-17a) Petitioners further asserted that by directing entry of judgment for Shell, the Court of Appeals denied Petitioners their due process rights to challenge the constitutionality of the application of Act 61 as it applied to them. (App. B; pp. 17a-19a) The Court of Appeals denied the petition on July 6, 1998. (App. A)

ARGUMENT FOR GRANTING WRIT

The Court of Appeals' decision constitutes an egregious violation of Petitioners' due process rights. On the basis of assumption and erroneous factual determinations unsupported by the record, the Court of Appeals reversed the District Court's carefully considered opinions (App. G, H & I) and decided the doctrine of res judicata barred Petitioners' action. In determining that res judicata barred Petitioners' action, the Court of Appeals completely disregarded the fact that *Brown v. Shell* was not originally a class action, but involved only 13 individual plaintiffs, that *Brown v. Shell* involved a different claim than the claim involved here, and that the parties to the *Brown v. Shell* litigation specifically agreed that only the Act 48 issue would be litigated in that action.

The Court of Appeals also denied Petitioners' right to due process by interpreting Act 61 in a way that precludes Petitioners' recovery without allowing them the opportunity to present their constitutional challenge to that court's improper interpretation of the statute.

ARGUMENT I

The Court of Appeals' determination that Petitioners' claims were precluded by *Brown v. Shell* denied Petitioners due process.

According to Michigan's broad rule of res judicata, a prior action bars not only claims actually litigated in that action, "but every claim arising out of the same transaction which the parties, exercising reasonable diligence," **could have raised but did not**. *Gose v. Monroe Auto Equipment Co.*, 409 Mich. 147, 160; 294 N.W.2d 165 (1980); *Curry v. Detroit*, 394 Mich. 327, 332; 231 N.W.2d 57 (1975); *Gursten v. Kenney*, 375 Mich. 330, 333-335; 134 N.W.2d 764 (1965); *Courtney v. Feldstein*, 147 Mich. App. 70; 382 N.W.2d 734 (1986) (emphasis added).

A prior judgment will constitute a bar to a claim in a subsequent action when: (1) the first action was decided on the merits; (2) the matter contested in the second action was or could have been resolved in the first action; and (3) both actions involve the same parties or their privies. *Curry*, *supra*. The individual parties to the *Brown v. Shell* action stipulated to limit the issues addressed in that litigation to the application of Act 48 before the remaining issues were resolved by the class action settlement. Therefore, Petitioners' Act 61 claims were not and could not have been raised in the *Brown v. Shell* litigation, and thus, this action is not barred by the doctrine of res judicata. The Court of Appeals denied Petitioners' due process rights by deciding otherwise.

In *Hansberry v. Lee*, 311 U.S. 32, 37 (1940), this Court held that the Due Process Clause of the Fourteenth Amendment is violated when a judgment in a prior action is used to bind litigants who were not parties and were not adequately represented. This Court recently reaffirmed *Hansberry* in *Richards v. Jefferson County*, 517 U.S. 793 (1996), a case

similar to the instant case.

In *Richards*, a class representing all nonfederal employees subject to Jefferson County, Alabama's occupational tax brought suit challenging the constitutionality of the tax. Jefferson County moved for summary judgment, arguing that a prior adjudication of the tax in an earlier action brought by the City of Birmingham and two city officials, which was consolidated for trial with a suit brought by three county taxpayers, barred the action. The trial court granted the motion as to the state constitutional claims, but refused to grant the motion as to the federal constitutional claims as those claims had not been decided in the prior adjudication. *Id.* at 795-796. The Alabama Supreme Court ruled that the prior adjudication barred both the state and federal issues because the federal constitutional issues had been raised in the first case and could have been adjudicated, and the taxpayers in the first case adequately represented the interests of the class members in the second case. This Court held that the Alabama Supreme Court's application of res judicata denied the petitioners due process of law. *Id.* at 797.

This Court recognized that while states "are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes, . . . extreme applications of the doctrine of res judicata may be inconsistent with fundamental federal rights." *Id.* This Court unanimously held that application of res judicata violates due process where the parties to the first action failed to adequately represent the class members in the second action, and where class members in the second action received no notice that the first action would conclusively resolve their legal rights. The District Court recognized that principle when it rejected Shell's affirmative defense of res judicata. (App J)

Applying the reasoning employed by this Court in *Richards* to the instant case, the Court of Appeals' holding that

Petitioners are bound by the adjudication in *Brown v. Shell* deprived them of the due process of law guaranteed by the Fourteenth Amendment.

> **Because most of the 864 class members involved in this action were not parties to the Act 48 litigation in *Brown v. Shell*, their claims cannot be barred by that decision.**

Just as the class members in *Richards* were not parties to the prior adjudication involving the City of Birmingham and five individuals, the vast majority of Petitioners in this case was not party to the Michigan Court of Appeals' decision on Act 48 in *Brown v. Shell.* The First Amended Complaint in *Brown v. Shell* named only 13 individual plaintiffs. Shell filed a motion for partial summary judgment dealing exclusively with the Act 48 severance tax issue, which the trial court granted. The Act 48 severance tax issue was severed from the rest of the plaintiffs' claims and appealed to the Michigan Court of Appeals. The remaining issues were left to be litigated between Shell and the 13 individual plaintiffs. Those issues were ultimately settled and, on March 29, 1984, the parties in *Brown v. Shell* filed a Motion to Approve Settlement which specifically indicated that the settlement had no effect on the Act 48 severance tax issue and settled only those claims specified in the settlement and agreed-upon notice to the class. (App L; pp. 137a-199a)

Pursuant to the settlement agreement, the parties in *Brown v. Shell* agreed to class certification only as to those claims settled. The class certification in no way related to the Act 48 severance tax issue. As such, the Act 48 severance tax issue was never litigated by or made a part of the *Brown v. Shell* class. Accordingly, the Court of Appeals statement that the 864 current class members were part of "another class which sued Shell Western, claiming that the Act 48 deductions breached the parties' lease," is contrary to the facts of the case.

(App. C; p. 24a) The Court of Appeals' holding that Petitioners, who were not parties to the *Brown v. Shell* Act 48 litigation, are bound by that prior adjudication denies Petitioners' right to due process of law.

> **Pursuant to the express agreement of the parties, the Act 61 claims raised in this case were not and could not have been litigated in *Brown v. Shell***
>
> As this Court noted in *Richards*,
>
> Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, -- whether it has had an opportunity to present its case and be heard in its support. . . . A State may not deprive a person of all existing remedies for the enforcement of a right . . . unless there is, or was, afforded to him some real opportunity to protect it.

Richards, *supra* at 804.

The Court of Appeals' holding that *Brown v. Shell* bars Petitioners' Act 61 claim denies them due process of law by foreclosing their opportunity to present that claim when they had no opportunity to do so in *Brown v. Shell*.

Early in the *Brown v. Shell* litigation, Shell agreed to limit the scope of the court's inquiry to the Act 48 severance tax issue. Specifically, Shell and the 13 individual plaintiffs stipulated to an order granting a motion to amend which expressly provided:

> ***[J]udicial economy makes advisable the limiting of issues to be litigated*** to two: the

> propriety of defendant charges imposed upon plaintiffs for certain operations of the Kalkaska gas plant and further, ***defendants imposition upon plaintiffs of a portion of the severance tax chargeable to the individual wells***. (App. L; p. 134a) (emphasis added)

By express agreement of the parties to the prior action, Act 61 was not litigated in *Brown v. Shell*. Pursuant to the parties stipulation, Act 61 issues could not have been litigated in that action. This Court cannot sanction Shell's attempt to use the stipulation in the *Brown v. Shell* litigation as a sword. As this Court has noted:

> **[A] prior proceeding, to have binding effect** on absent parties, **would *at least* have to be** "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is **so conducted as to insure the full and fair consideration of the common issue."**

Richards, *supra*, at 801, quoting *Hansberry*, *supra*, at 43 (emphasis added).

The Court of Appeals' determination that the decision in *Brown v. Shell* barred Petitioners' Act 61 claim is patently unfair, inconsistent with the res judicata doctrine, and denies Petitioners' due process rights. Shell cannot agree to limit the scope of litigation and then use that limited adjudication to defeat subsequent unrelated claims. To allow Shell to do so deprives Petitioners of any opportunity to protect their rights. The Court of Appeals' decision authorizes Shell to renege on its commitment and promise included in the stipulation and agreement to settle the *Brown v. Shell* litigation. Such a decision is incompatible with due process.

The Act 61 claims raised in this action are different in kind and different in time than the Act 48 claims adjudicated in *Brown v. Shell*

The Court of Appeals incorrectly assumed that "plaintiffs' claim that Shell Western has breached the ***same*** leases by deducting the Act 61 fee . . . " (App C; p. 24a)(emphasis added) The leases at issue in this case are not the same leases at issue in *Brown v. Shell*. Although the lease forms are the same, the breaches alleged by the 13 individual plaintiffs in *Brown v. Shell* in no way cover the 864 leases breached in this case. In any event, the Court of Appeals' statement that both this action and *Brown v. Shell* were based on the same leases, i.e. the same lease forms, implies that the leases may give rise to only one cause of action. Obviously, this is not and cannot be the law. Where there are continually repeating breaches, a new claim arises after each breach and a new cause of action may be asserted.

For example, in *United Black Firefighters Assoc. v. City of Akron*, 976 Fd.2d 999 (6th Cir., 1992), the court held that a union was not barred by res judicata from raising certain objections to a 1990 racial discrimination case brought by the same Plaintiff who had litigated a nearly identical racial discrimination issue in 1986 and obtained a consent decree. In finding res judicata inapplicable, the Court of Appeals relied on this Court's decision in *Brown v. Felsen*, 442 U.S. 127, 131 (1979), which stated that "under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the **same cause of action**." The *United Black Firefighters'* Court held that "the 1986 consent decree was concerned with remedying alleged racial discrimination prior to 1986" while "the present consent decree is designed to remedy alleged racial discrimination in connection with a 1990 promotional examination which occurred after the 1986

consent decree became effective." *United Black Firefighters, supra*, at 1005. Even though the racial discrimination was potentially of the same sort in both cases, the fact that the new discrimination constituted a new cause of action precluded the application of res judicata.

In this case, a new cause of action accrued each time Shell wrongfully withheld a portion of the royalty payments. *Profit Sharing Trust v. Bell River Joint Venture*, 149 Mich. App. 327, 333; 386 N.W.2d 185 (1986). Accordingly, a new cause of action accrues with each wrongful royalty payment and precludes the application of res judicata in this case. The Court of Appeals' holding that the decision in *Brown v. Shell* bars Petitioners' claim violated their due process rights.

ARGUMENT II

The United States Court of Appeals denied Petitioners due process of law by failing to remand this case to the District Court for consideration of Petitioners' federal and state constitutional claims.

In their complaint, Petitioners contended that if Act 61 is interpreted as imposing a fee obligation on them, then Act 61 is unconstitutional. The District Court determined that the Act 61 privilege fee could not be imposed on Petitioners in the absence of a contractual agreement and held that Shell's deduction of the fee constituted a breach of contract. In light of the District Court's ruling in favor of Petitioners on nonconstitutional issues, the District Court dismissed Petitioners' constitutional claims as moot. (App. J)

Ignoring the importance of the constitutional issues raised by Petitioners, the Court of Appeals construed Act 61 in

a manner violative of both the federal and state constitutions. The Court of Appeals did so without first affording Petitioners the opportunity to pursue their constitutional claims in violation of their right to due process. Accordingly, Petitioners respectfully request that this Court grant their petition for writ of certiorari, reverse the decision of the Court of Appeals and remand this case for consideration of Petitioners' constitutional claims.

The Court of Appeals' total disregard of well established rules of statutory construction deprived Petitioners due process.

The Court of Appeals misinterpreted Act 61 and then used its misinterpretation of Act 61 to defeat Petitioners' claim without affording them the opportunity to challenge the constitutionality of Act 61 as applied.

First, the Court of Appeals' interpretation of Act 61 violated the most fundamental rules of statutory construction and ignored Michigan case law.

> A cardinal principle of statutory construction is that where the Legislature has defined a word or term in an act, a court is bound by that definition. We reiterated this precept in *Earlandson v. Genesee County Employee's Retirement Comm'n*, 337 Mich. 195, 204; 59 N.W.2d 389 (1953).

Carr v. General Motors Corp., 425 Mich. 313; 389 N.W.2d 686 (1986).

Both Act 61 and Act 48 define the term "producer." However, the acts define the term in significantly different ways. Act 61 contained the following definition:

> "Producer" means the operator, whether owner or not, of a well or wells capable of producing oil or gas or both in paying quantities.

Mich. Comp. Laws Ann. § 319.2(h).

Act 48 defines "producer" as follows:

> "Producer" **as used in this act** means a person who owns, or is entitled to delivery of a share in kind or a share of the monetary proceeds from the sale of, gas or oil as of the time of its production or severance.

Mich. Comp. Laws Ann. § 205.312(2)(emphasis added).

In its opinion, the Court of Appeals correctly recognized that "only Shell Western is a 'producer' under Act 61," (App. C; p. 30a) However, the court then ruled that the term "producer" as defined in Act 48 must be read into Act 61. (App. C; p. 34a). The Court of Appeals cited no authority for its departure from the well-established rules of statutory construction.

In ignoring the definition of "producer" contained in Act 61 and holding that Act 48's definition of the term controlled, the Court of Appeals disregarded another fundamental rule of statutory construction: When the legislature employs the restrictive phrase, "as used in this Act," the legislature intended the definition to be limited to that particular act. See, *Wrigley Stores, Inc. v. Board of Pharmacy*, 336 Mich. 538; 59 N.W.2d 8 (1953). In dismissing an allegation that a definition of "drug" in one act controlled the meaning of that term in another act, the court held:

> PA 1909, No. 146, above referred to, in setting forth its definition of the word drug, gave that

> definition with the restriction, "the term 'drug' as used in this Act," so that the legislature must be understood to have limited the definition as contained in Act 146 to the things mentioned in that Act and not to have intended that that definition in that Act should be construed or used as explaining the meaning of the word drug as contained in the pharmacy act.

Id. at 590.

The Court of Appeals' decision that Act 48's definition of "producer" should be read into Act 61 ignores two very important facts: (1) Act 61 contains a definition of the term "producer" that is different from the definition contained in Act 48; and (2) Act 48's definition of "producer" express limits the use of that definition to that act only.

On one hand, the Court of Appeals recognizes that "the general thrust of Act 61 is to provide for a supervisor of well to oversee the extraction of oil and gas in Michigan" and that "the fee imposed by Section 22 provides funds for this oversight." (App. C; p. 34a) On the other hand, the court ignores this statutory purpose and interprets Act 61 as imposing liability on royalty owners in disregard of the "fundamental canon of statutory construction that the words of the statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't. of Treasury*, 489 U.S. 803 (1989).

In short, the Court of Appeals decision ignores the most basic principles of statutory construction without providing any authority or reason for doing so. Such a complete departure from established procedure denies Petitioners due process of law.

The Court of Appeals' decision denied Petitioners of due process of law by ignoring relevant case law and legislative history.

In addition to violating well-established rules of statutory construction, the Court of Appeals' construction of Act 61 also ignores other Michigan court pronouncements concerning the interplay between Act 61 and Act 48, as well as the Legislative history of both Act 61 and Act 48. In *Brown v. Shell*, *supra*, the Michigan Court of Appeals specifically referred to the Act 61 fee as a privilege tax separate and distinct from the Act 48 severance tax. The *Brown* Court made direct reference to an opinion of the Michigan Attorney General in which the Attorney General concluded that the payment of Act 48 severance taxes and Act 61 privilege fees were the responsibility of producers of gas and oil, not of the owners of royalty interests. OAG 1963-1963, No. 4160, p. 118 (June 17, 1963). (App. O)

The *Brown* Court reasoned that in response to the Attorney General opinion, in 1965 the Michigan Legislature amended only Act 48 to add a definition of producer that included royalty owners. Before the amendment, the Act 48 tax was levied on "each corporation, association, or person engaged in the business of severing from the soil, oil or gas . . ." *Brown*, *supra*, at 115. The *Brown* Court concluded that the new definition of producer in Act 48 title extended the scope of Act 48 so that owners of royalty interests were also responsible for the Act 48 severance tax. *Id.*, at 116.

In contrast, nothing in the history of Act 61 reflects a similar amendment in response to the Attorney General opinion, nor does there exist any basis for the Court of Appeals' conclusion that the Legislature intended to expand the scope of Act 61 to include royalty owners by incorporating into Act 61 Act 48's definition of "producer." Quite to the contrary, the express language of Act 61 illustrates that Act 61 does not

incorporate the taxing provisions of Act 48. The fee is simply collected by the method set forth in Act 48.

In this case, the Court of Appeals ignored the definition of "producer" contained in Act 61 and instead applied the definition of "producer" contained in Act 48 -- a definition specifically limited in application to Act 48 only. In doing so, the Court of Appeals violated at least three fundamental rules of statutory construction without providing any authority for its departure from those rules. The Court of Appeals also ignored Michigan state court precedent and the legislative history of both Act 48 and Act 61. The Court of Appeals' decision so far departs from the ordinary course of judicial procedure that this Court's intervention is compelled.

The Court of Appeals' decision deprives Petitioners of due process of law by denying them any opportunity to pursue their constitutional claims.

The Court of Appeals' conclusion concerning the meaning and scope of Act 61 renders it unconstitutional in the following respects:

1. When construed to impose financial liability upon royalty owners, Act 61 fails to clearly and plainly state that it is a tax imposed upon royalty owners, and that fact that it does so by reference to another statute violates Mich. Const. 1963, art. 4 § 32, which requires that "[e]very law which imposes, continues or revives a tax shall distinctly state the tax."

2. When construed to impose financial liability on royalty owners, Act 61 fails to make reference in its body or title to any obligation being imposed as a fee or tax upon royalty

owners, and thus, violates the title object clause of Mich. Const. 1963, art. 4, § 24.[2]

3. When construed to impose financial liability upon royalty owners that are not engaged in the business of producing gas and oil, Act 61 violates both Petitioners' federal and state constitutional rights to due process by imposing a fee on royalty owners that is meant to apply only to those in the business of producing gas and oil. U.S. Const Am. 14; Mich. Const. 1963, Art. 1, § 2.[3]

Given the Court of Appeals' reversal of the District Court's decision, remand for consideration of Petitioners' constitutional claims was the only course of action adequate to protect Petitioners' due process rights.

> If the judgment is permitted to stand, deprivation of plaintiff[s'] property is accomplished without [them] ever having had an opportunity to defend against the exaction.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 679 (1930).

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[2] "[A] title is an indispensable part of every statute, and the expression of the subject of the Act must be found, if at all, in the words of the title." *Welsh v. Ohanesian*, 378 Mich. 24, 29; 142 N.W.2d 690 (1966).

[3] "That consistent with the due process clause of the 14th Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt. . ." *Frost v. California R.R. Comm'n.*, 271 U.S. 583, 592 (1926).

CONCLUSION

The Court of Appeals' decision constitutes a denial of Petitioners due process rights on all fronts -- from the Court's decision that res judicata barred Petitioners' claim, to its complete departure from the rules of statutory construction in its interpretation of Act 61, to its failure to remand this matter for consideration of Petitioners' constitutional claims. Throughout its decision, the Court relied on assumptions it made which had no factual support in the record. If the Court of Appeals' decision is allowed to stand, Petitioners will be denied the opportunity to present their constitutional challenges in violation of due process and Shell will have carte blanche authority perpetually to breach its leases with royalty owners. Petitioners respectfully request that a Writ of Certiorari issue, and that this Court summarily dispose of this case pursuant to Sup. Ct. R. 16 by reversing the United States Court of Appeals' decision regarding res judicata, vacate the remainder of that decision and remand this case to the District Court for full consideration of Petitioners' claims.

/s/_____
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